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No. 97-1230

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF WEST COVINA,
Petitioner,
v.
LAWRENCE PERKINS; CLARA PERKINS;
APRIL PERKINS, a minor, by and through
LAWRENCE PERKINS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached

brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of respondents to consent to this filing.

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compelling interest in the issue presented in this case: the nature and extent of the due process obligation of state and local governments to advise citizens of post-deprivation remedies provided by state law.

Amici submit that the court of appeals erred in holding that the Due Process Clause of the Fourteenth Amendment requires state and local law enforcement officers executing a lawful search pursuant to a valid search warrant to furnish notice that "inform[s] the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court" and "explain[s] the need for a written motion or request to the court stating why the property should be returned." Pet. App. A22. The court of appeals' holding is unprecedented, unreasonable, and opens the door to extensive governmental liability under 42 U.S.C. § 1983 as state and local officials, and the courts, struggle to determine the amount of notice regarding readily available state law post-deprivation remedies that must be provided in order to satisfy due process.

Because of the importance of these questions to *amici* and their members, *amici* respectfully request that this Court grant their motion for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Due Process Clause of the Fourteenth Amendment requires state and local law enforcement officers executing a lawful search pursuant to a valid warrant to furnish notice of the procedure for contesting the seizure, as well as information required for initiating the procedure in the appropriate court, and explaining the need for a written motion or request to the court seeking the return of the property.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.[1]

[1] Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

STATEMENT

This case presents important questions about the duties and obligations of government and citizen.

1. California law provides extensive remedies for the recovery of seized property. One such remedy, referred to by the court of appeals, *see* Pet. App. A15-A16, is "a nonstatutory motion for release of property seized under a search warrant" pursuant to § 1536 of the California Penal Code. *People v. Superior Court, Orange County*, 104 Cal. Rptr. 876, 883 (Ct. App. 1972) (hereinafter *"Orange County"*); *see also People v. Icenogle*, 210 Cal. Rptr. 575, 577 (Ct. App. 1985). This "summary proceeding" is designed to allow the movant " 'to recover property which . . . is already in the hands of the court,' " and it specifically dispenses with " 'the expense and complications of bonds and other procedures.' " *Orange County*, 104 Cal. Rptr. at 883 (quoting *Gershenhorn v. Superior Court, Los Angeles County*, 38 Cal. Rptr. 576, 579 (Dist. Ct. App. 1964)); *see also Buker v. Superior Court, County of San Diego*, 102 Cal. Rptr. 494, 496 (Ct. App. 1972) (California courts have authority to restore property seized pursuant to a search warrant under both § 1536 and "the inherent power of the court to control and prevent the abuse of its process"); 4 B.E. Witkin & Norman L. Epstein, *California Criminal Law* § 2461, at 2930 (2d ed. 1989).[2]

[2] In addition to the summary proceeding provided by § 1536, California law provides that a person whose property has been seized pursuant to a search warrant may seek its recovery through a common law action for conversion. *See, e.g., Coy v. County of Los Angeles*, 1 Cal. Rptr. 2d 215, 221-22 (Ct. App. 1991); *People v. Superior Court, Orange County*, 104 Cal. Rptr. 876, 884 (Ct. App. 1972); *see also* 20 Cal. Jur. 3d (Rev.) *Criminal Law* § 2573 (1998) (surveying various civil remedies available to a person whose property has been seized pursuant to a search warrant). California law also provides that, upon denial by the court of a property owner's request for restoration of the property, "the party claiming the exhibit has available . . . [a] writ of mandate to determine whether the court was justified in refusing to return the exhibit to him." *Orange County*, 104 Cal. Rptr. at 884 (citations omitted).

Under California law, only the court has the authority to direct the return of property to the person from whom it has been seized.[3] " 'The seizing officer claims no right in or to the property, or in or to its possession, save and except as the court may find use for it. He must respond, as does any custodian, to the orders of the court for which he acted.' " *Orange County*, 104 Cal. Rptr. at 883 (quoting *Gershenhorn*, 38 Cal. Rptr. at 579); *Coy*, 1 Cal. Rptr. 2d at 222 (same); *see also* Pet. App. A16 (opinion of the court of appeals); Pet. App. E5 (opinion of the district court). The court of appeals expressly held that the post-deprivation procedures provided to respondents by California law for the recovery of the property seized pursuant to the warrant " 'satisfy the requirements of due process.' " Pet. App. A17 (quoting *Aday v. Superior Court*, 362 P.2d 47, 53-54 (Cal. 1961)).

2. West Covina police officers lawfully executed a valid search warrant at respondents' residence on May 21, 1993. Respondents were not present. Pet. App. E3. Pursuant to the warrant, the officers seized various items, including a twelve-gauge shotgun, a starter pistol, and cash. The officers left a " 'Search

[3] Seizure pursuant to a lawful warrant does not effect a final deprivation of property; the government is a bailee when it seizes property. *See, e.g., Coy*, 1 Cal. Rptr. 2d at 220; *Minsky v. City of Los Angeles*, 520 P.2d 726, 733 (Cal. 1974).

Warrant: Notice of Service' in [respondents'] home after the search and seizure." Pet. App. E2 (quoting Def. Exh. 2). This notice informed respondents of (1) the search, (2) the date of the search, (3) the particular property seized, (4) the fact that the search was undertaken pursuant to a warrant, (5) the name of the judge who had issued the warrant, (6) the court of the judge who had issued the warrant, (7) the date of the warrant, and (8) the names and telephone numbers of three police officers. Pet. App. A3-A5.

"Shortly after discovering his property missing, Perkins called [a West Covina detective] and inquired about how to get his property back. Another detective informed Perkins that he needed a court order." Pet. App. E3 (opinion of the district court) (citing Perkins Depo. 205:22-206:1). Mr. Perkins "was told what court and what judge to go to." *Id.* at E7; *see also* J.A. 123-24.

> Then, about a month after the search, Perkins went to the Citrus Municipal Court to try to get his property back. Perkins Depo. 206:5-208:2. He attempted to see Judge Oki, but was told that Oki was on vacation. He then attempted to get another judge to release his property, but was told the court had nothing under his name. Perkins did not submit any kind of written request, fill out any form, go back to the court on any other occasion, or make any other inquiries in any manner. *Id.*

Pet. App. at E3. The district court rejected, as unsupported "speculation," respondents' contention that the fact that Mr. Perkins did not have the search warrant number was fatal to his attempt to recover his property. *Id.* at E6.

3. Respondents filed this action under 42 U.S.C. § 1983 on November 19, 1993. J.A. 4. Petitioner's counsel informed respondents' counsel of the search warrant number as early as January 26, 1994, and no later than March 15, 1994. *Id.* at 70. Even after that date, however, respondents did not file a request with the court seeking restoration of their property, or otherwise invoke any of the remedies available to them under California law. *Id.* On March 1, 1994, the City filed in Los Angeles County Municipal Court a "Request and [Proposed] Order for Release of Property" concerning the property seized at respondents' residence on May 21, 1993. J.A. 33-35; Pet. App. E3. On June 24, 1994, as a result of the City's request, "Perkins received his property (except for a starter pistol which the police retained because it had been reported stolen)." *Id.*; Pet. App. A7.

Respondents' § 1983 complaint did not challenge the adequacy of the notice. Rather, they challenged the validity of the warrant and the seizure of the property. J.A. 9. Both issues were resolved against respondents, *see* Pet. App. A8-A17, and neither is at issue in this case. Following respondents' appeal, the court of appeals remanded the case "for clarification of the status of the bifurcated claim that West Covina violated due process by failing to provide adequate post-deprivation procedure for the recovery of seized property." *Id.* at D2. On remand, the district court held that both the notice and the State's return remedies were constitutionally adequate. *Id.* at E3-E7. Respondents appealed.

The court of appeals agreed that the State's return procedure is constitutionally sound. Pet. App. A13-A17. A divided panel, however, determined that the

notice was constitutionally deficient. The majority held that "[i]n cases where property is taken under California law," due process requires that local officials provide a written notice that contains two major components. Pet. App. A22. First, the notice must include certain information that was included on the notice left at respondents' residence (*i.e.*, the fact of the search, its date, the searching agency, the issuing judge, the judge's court, and persons to be contacted for additional information). *Id.* Second, the notice must include information regarding the return procedures available under state law—"the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court"; it "must explain the need for a written motion or request to the court stating why the property should be returned"; and it must include "the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file." *Id.*

SUMMARY OF ARGUMENT

The court of appeals' constitutional analysis is deeply flawed. As the dissenting judge below correctly observed, "[b]y imposing a duty on the police officers to advise [respondent Lawrence Perkins] on matters of state law, the opinion adds a due process requirement that has support neither in the case law nor in the Due Process Clause." Pet. App. A23-A24 (Leavy, J., concurring in part and dissenting in part). Judge Leavy further emphasized that "California law provides a means for [respondent Lawrence Perkins] to obtain return of his property," that due process does

not "require[] the City of West Covina to advise Perkins of his remedies," and that "[t]he Due Process Clause does not require the City of West Covina to provide legal advice to Perkins or any other person with a claim against the city." *Id.* at A25.

The panel majority's expansion of the constitutional parameters of notice to mandate the inclusion of publicly available information regarding post-deprivation remedies—the adequacy of which are not at issue—is unprecedented. No principle of law or logic requires a governmental entity to notify individuals of such readily accessible post-deprivation remedies. To the contrary, the majority's apparent belief that citizens are not capable of informing themselves about laws directly affecting their interests reflects a paternalistic view of the role of government that this Court repeatedly, and appropriately, has refused to indulge, absent extraordinary and compelling circumstances which are not present in this case.

The court of appeals' opinion, moreover, has profound adverse consequences for state and local governments. This novel ruling unjustifiably ties the hands of those governments by transforming matters of policy, with regard to which state and local governments should be free to differ, into constitutional imperative. Certainly, reasonable minds can disagree on the policy question whether search notices should include additional information about publicly available statutory remedies; equally certain, however, is that the Constitution does not *mandate* the inclusion of such information. Furthermore, the majority's decision sanctioning federal judicial re-formulation of local policy and micromanagement of municipal codes of conduct undermines stability and predictability

for these governmental entities by subjecting them to the likelihood of open-ended obligations under the Due Process Clause. Accordingly, the judgment of the court of appeals should be reversed.

ARGUMENT

The court of appeals' conclusion that the Due Process Clause requires notices to include readily accessible public information regarding statutory remedies is unprecedented and erroneous. The extensive written information left by the West Covina police officers and received by respondents plainly comported with established principles of constitutional notice. There is no basis for superimposing, as a matter of constitutional command, a requirement that notices include additional information regarding either post-deprivation remedies provided by state law or legal advice concerning the invocation of those state law remedies.

I. RESPONDENTS RECEIVED ACTUAL NOTICE AND THE POST-DEPRIVATION PROCESS PROVIDED BY STATE LAW IS CONSTITUTIONAL

The question before the Court is narrow, but important. It is helpful to frame this question by emphasizing three issues which, as the case comes to this Court, have been conclusively determined by the lower courts and thus are not at issue.

First, respondents do not challenge either the factual finding that they received actual written notice of the search of their residence and the seizure of their property, *see* Pet. App. A4-A5 (opinion of the court of appeals); *id.* at E2 (opinion of the district court), or the method by which they were so notified.

Compare Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 479 (1988) (analyzing whether due process permits the use of constructive notice through publication); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 792 (1983) (same).

Second, the court of appeals held that the California statutes governing the return of property seized pursuant to a search warrant provide constitutionally sufficient post-deprivation process, and that holding is not at issue in this Court. *See* Pet. App. A17 ("We agree with the California Supreme Court that '[t]hese various [state law] remedies satisfy the requirements of due process.'") (quoting *Aday*, 362 P.2d at 54); Cal. Penal Code § 1536; *Coy*, 1 Cal. Rptr. 2d at 220 (describing California's state law remedies); *Orange County*, 104 Cal. Rptr. at 883 (same); *see also* pp. 2-3, *supra*.

Third, the court of appeals likewise held that due process did not require the State of California to provide *pre*-deprivation process, and that holding also is not at issue in this case. *See* Pet. App. A14 ("There is . . . no requirement of a prior hearing before a seizure of possessions under a search warrant."); *see also, e.g., Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) ("[W]e have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property.") (citation and internal quotations omitted).

Unlike many of the due process cases addressed by this Court, therefore, it is clear at this stage of the case that (1) respondents received actual written notice of the deprivation of property, (2) the post-deprivation procedures provided by California law are

constitutionally adequate, and (3) no pre-deprivation hearing was required. Thus, the only issue before the Court relates to the adequacy of the substantive *content* of the notice. As explained below, the content of the notice in question satisfied the requirements of due process.

II. THE NOTICE AND POST-DEPRIVATION OPPORTUNITY TO BE HEARD SATISFIED DUE PROCESS

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), it is now beyond dispute that the "procedural" component of the due process clause requires the government to provide notice and an opportunity to be heard, at a meaningful time and in a meaningful manner, at some time before a deprivation of life, liberty, or property becomes final. *See, e.g., id.* at 314; *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In this case, the governmental actions and policies provided constitutionally sufficient notice and opportunity to be heard. West Covina police provided respondents with contemporaneous notice of the deprivation of their property. The notice explained that a search warrant authorized the deprivation; provided the date, issuing judge, and court for the warrant; itemized the property seized; and listed names and telephone numbers of three police officers. Pet. App. A22. The publicly available return procedure, moreover, provided a constitutionally adequate opportunity to be

heard. *See* Cal. Penal Code § 1536; Pet. App. A17; *see also* pp. 2-3, *supra*.

Thus, the sole question presented in this case is whether the Constitution mandates that notices provided by state and local officials include additional information regarding accessible and publicly available remedies for the return of property lawfully seized pursuant to a valid search warrant. The answer, quite clearly, is no. Nothing in the Constitution, or this Court's decisions construing the parameters of notice — including *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978)—compels such a remarkable conclusion. Taken together, the written information left at respondents' home and the remedies for recovery of property provided by California law satisfy the touchstone of due process: notice and an opportunity to be heard.

A. The Due Process Clause Does Not Require Government Officials To Provide Notice Of, Or Advice Regarding, Post-Deprivation Remedies Available Under State Law

Government entities and officials are under no constitutional obligation to provide notice of otherwise available information regarding the post-deprivation remedies provided by state law.

Neither *Mullane* nor *Memphis Light* presented an issue concerning notice of the availability of state law post-deprivation remedies. In *Mullane*, the issue was whether interested parties were required to be advised of the pendency of a judicial settlement of trust accounts. *See* 339 U.S. at 309. The information at issue concerned the settlement of particular trusts, not the existence of publicly available laws (such as the trust

settlement statute itself) or the procedures established by such statutes. *Id.* at 309-10. Nothing in this Court's opinion implies an obligation to explain the existence of the publicly available statute governing these trust accounts, or the methods or procedures for invoking the statute.

Similarly, in *Memphis Light* the issue was whether ratepayers were required to be advised of the utility's own procedures for challenging disputed charges. *See* 436 U.S. at 13-14 (discussing notice regarding availability of "avenue of redress within the organization"). The decision did not involve a constitutional requirement that the utility provide customers with information about readily available statutory remedies. *See id.* at 15 (constitutional flaw with notice was the failure to provide advice regarding utility's own procedures). Indeed, Justice Stevens' dissent emphasizes that the Court did not require advice regarding publicly available legal remedies. *See id.* at 26 (Stevens, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) ("[T]he Court wisely avoids holding that the customer must be given that sort of legal advice"—*i.e.*, "an explanation of the legal remedies that are available if a wrongful termination should occur" and of the possible "relief in court").

Further, a constitutional mandate requiring government officials to provide information about post-deprivation legal remedies would conflict with long-standing principles. "All citizens are presumptively charged with knowledge of the law," *Atkins v. Parker*, 472 U.S. 115, 130 (1985), and a doctrine of constitutional command rejecting this settled presumption would overturn well-established precedent. *See, e.g.*, *id.* at 131 ("The entire structure of our democratic

government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny."); *Texaco, Inc. v. Short*, 454 U.S. 516, 532-33 (1982) ("It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("[E]veryone is charged with knowledge of the United States Statutes at Large."); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 243 (1944) ("All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes."); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it."); *see also, e.g., Reetz v. Michigan*, 188 U.S. 505, 509 (1903) ("When a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice."); Oliver Wendell Holmes, *The Common Law* 41 (1881) ("[E]very one is presumed to know the law.").[4]

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[4] Although this presumption "[a]rguably" may be overcome in certain limited circumstances, *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *cf. Cheek v. United States*, 498 U.S. 192, 199-200 (1991) (concluding, in a criminal tax evasion case, that the "common law presum[ption] that every person knew the law" did not apply because of the "complexity of the tax laws"), there is no basis in this case for

Furthermore, the open-ended notice obligations mandated by the court of appeals—that government must advise citizens of state law remedies that are presumptively known—are, as a practical matter, virtually impossible for state and local governments to implement. For example, a number of different legal remedies may be available to challenge notice of various government actions. Government officials should not be required, on pain of § 1983 liability, to canvass the law books and identify remedies that may or may not be applicable in a particular factual situation. Indeed, the court of appeals' ruling would require state and local officials to provide information regarding nonstatutory, common law, and equitable remedies as well. *See* pp. 2-3, *supra*. In addition, the court of appeals' decision would require government officials and, inevitably, the courts, to make difficult legal judgments about which remedies apply and under what circumstances, and to determine just how much notice regarding such readily available state law post-deprivation remedies must be provided in order to satisfy due process. The court of appeals' ruling thus would impose potentially limitless burdens on government entities.

Even more remarkably, the court of appeals also criticized the notice provided by petitioner because it did not include specific legal *advice* about the invocation and enforcement of those legal remedies. Pet. App. A22 ("[T]he notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, *along with any additional information required for initiating that procedure in the appropriate court*. . . . [The notice also] must ex-

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rejecting the application of this time-honored principle. *See* pp. 3-5, *supra*.

plain the need for a written motion or request to the court stating why the property should be returned.") (emphasis added). Thus, state and local governments would be responsible for monitoring a host of remedies, and then providing legal advice regarding the invocation of those remedies. Once again, such a ruling is unreasonable, unprecedented, and imposes open-ended burdens on state and local governments.[5]

"The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny. To contend that [the notice at issue] was constitutionally insufficient is to reject that premise." *Atkins*, 472 U.S. at 131. The court of appeals' decision does precisely that—it rejects this basic democratic premise and assumes that respondents and all other citizens are incapable of

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[5] As part of its requirement that the police provide notice of a "judicial remedy" and "some guidance for invoking that remedy," Pet. App. A18, the court of appeals also required a warrant number or other information concerning "the means of identifying the court file." *Id.* at A22. Just as the police have no constitutional obligation to provide information regarding procedures for invoking the return procedure generally, they have no constitutional obligation to provide notice regarding the court's file-keeping.

To the extent that respondents object to individual employees' failure to provide respondent Lawrence Perkins with information concerning the warrant, that objection is an inadequate basis for either a constitutional notice mandate or § 1983 liability. *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981); *see also* pp. 20-22, *infra*. Moreover, in ruling on the parties' cross-motions for summary judgment, the district court rejected respondents' contention that the fact that Mr. Perkins did not have the search warrant number was fatal to his attempt to recover his property. Pet. App. E6.

protecting their own interests. As a consequence of this sweeping new constitutional holding, moreover, governmental entities will face an increased risk of liability under § 1983, and state and local government officials will be deprived of much-needed flexibility in formulating appropriate policy. Nothing in the Due Process Clause or this Court's precedents compels these results.

B. The Court Of Appeals' Analysis Contains Numerous Additional Errors That Warrant Reversal Of Its Judgment

The court of appeals' analysis contains numerous additional errors that warrant reversal of its judgment: (1) the court failed to appreciate the significance of the fact that the notice at issue related to a *post*-deprivation opportunity to be heard; (2) the court mistakenly relied on post-notice discussions between respondents and government employees to invalidate the notice; (3) the court improperly promulgated instructions regarding the contents of notice; and (4) the court incorrectly applied the analytical framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to a challenge to the substantive content of notice.

1. *The Court Of Appeals Failed To Appreciate The Significance Of The Fact That The Notice Related To A Post-Deprivation Opportunity To Be Heard*

The court of appeals' decision fails to appreciate the important difference between pre-deprivation and post-deprivation process. " 'The fundamental requisite of due process of law is the opportunity to be heard.' " *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394

(1914)). In the pre-deprivation context, notice ordinarily is individualized because the opportunity to challenge the proposed government conduct prior to the deprivation could not otherwise realistically be utilized. *Goss*, 419 U.S. at 581; *see also Memphis Light*, 436 U.S. at 14; *Mullane*, 339 U.S. at 314. This is not the case in the post-deprivation context, however, in which the existence of adequate and readily available state law remedies may be "sufficient to satisfy the requirements of due process." *Parratt v. Taylor*, 451 U.S. 527, 544 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986); *see also, e.g., Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (holding that "traditional common-law remedies are fully adequate to afford due process" in a case involving official conduct authorized by state law).

Mullane and *Memphis Light* are cases involving notice of a *pre*-deprivation opportunity to be heard—an opportunity that would not be meaningful without adequate notice before it occurred. This case, however, presents no issue regarding such a pre-deprivation opportunity, but rather, involves *post*-deprivation process (*i.e.*, the statutory return procedure for reclaiming lawfully seized property). Consequently, as Judge Leavy correctly observed, the majority of the court of appeals erred by relying on this Court's cases involving *pre*-deprivation notice. Pet. App. A24 (Leavy, J., concurring in part and dissenting in part).

Mullane involved an imminent judicial settlement of trust accounts. 339 U.S. at 309. If the parties did not receive notice reasonably calculated to reach them, they would be deprived of a meaningful opportunity to participate in the settlement. This Court empha-

sized that the notice at issue related to a pending proceeding, and the fact that parties who had not received adequate notice would be bound by such a proceeding. In the oft-quoted language of the decision, "[a]n elementary and fundamental requirement of due process *in any proceeding which is to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of *the pendency of the action* and *afford them an opportunity to present their objections.*" *Mullane*, 339 U.S. at 314 (emphasis added). The case thus concerned an imminent event that threatened to have final consequences with regard to the disposition of property. *Mullane* thus did not involve notice regarding post-deprivation remedies.

Nor did *Memphis Light*. As in *Mullane*, the issue in *Memphis Light* was the opportunity to participate in an imminent proceeding. In *Memphis Light*, the pertinent imminent proceeding might avert a deprivation of continuous electric service—an opportunity that again would not be meaningful without adequate notice. *See* 436 U.S. at 14-15 (the pertinent "purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, *an impending 'hearing'*"; notice "in a case of this kind" must advise of "the availability of a procedure for protesting a *proposed* termination of utility service") (emphasis added). As emphasized by Justice Stevens' dissent, *Memphis Light* did not involve notice regarding post-deprivation remedies. *Id.* at 26; *see also* p. 12, *supra*.[6]

[6] Indeed, an important issue in *Memphis Light* was the adequacy of the pre-deprivation process that was available to avoid a wrongful termination of utility service. *See* 436 U.S. at 16-19; *see also* p. 26, *infra*.

Here, by contrast, the only process at issue is the State's constitutionally adequate, *post*-deprivation statutory return remedies for seizures of property that are not final. *See* p. — & n.3, *supra* (under California law, government is bailee of seized property). As Judge Leavy explained in dissent, *Mullane* principles have been "developed and applied in the context of *predeprivation* procedures." Pet. App. A24 (Leavy, J., concurring in part and dissenting in part). He further explained that those principles are "inapplicable where, as here, [respondent] Perkins' property was rightfully seized pursuant to a search warrant without need for a predeprivation proceeding"). *Id.*

In sum, the court of appeals' holding that the notice at issue here was unconstitutional is based on the inappropriate extension, to the post-deprivation context, of notice principles that were developed in cases involving pre-deprivation process.[7]

[7] In addition to its error in extending the pre-deprivation notice principles developed in *Mullane* and *Memphis Light* to the post-deprivation context, the court of appeals also overlooked the fact that *Memphis Light*'s analysis of the adequacy of the notice was grounded in "the particular circumstances of a threat to discontinue utility service." 436 U.S. at 15 n.15. Thus, the court of appeals erred in extending *Memphis Light* beyond the "particular circumstances" of that case without first considering whether its reasoning was applicable in other contexts. *See United States v. Stanley*, 483 U.S. 669, 680 (1987) ("[N]o holding can be broader than the facts before the court."); *see also Crawford-El v. Britton*, 118 S. Ct. 1584, 1592 (1998).

2. *The Court Of Appeals Mistakenly Relied On Post-Notice Discussions Between Respondents And Government Officials To Support Its Holding That Notice Was Inadequate*

Contrary to the court of appeals' reasoning, *see* Pet. App. A19-A20, communications between respondents and police *after* respondents had received the notice provide no support for expanding constitutionally-mandated notice requirements.

The court of appeals stated that respondent Lawrence Perkins received "confusing and inaccurate information" in oral conversations after the notice was provided. Pet. App. A20. Even assuming, *arguendo*, the accuracy of this characterization,[8] the fact that individual employees provide confusing or inaccurate information during post-notice conversations does not support a conclusion that the notice was unconstitutional. The court of appeals failed to appreciate the important distinction between the *notice* and the *remedy*. Any inaccurate information Perkins may have received relates—at most—to the adequacy of the post-deprivation *remedy*; such misinformation has no relevance to the logically distinct question regarding the adequacy of the *notice*.

In any event, misinformation negligently provided by municipal employees does not support a constitutional claim against the individual employee, or the governmental entity, for several reasons. First, individual acts of negligence do not amount to an actionable "deprivation" under the Due Process Clause. *See*,

[8] Among other reasons to question the court of appeals' characterization is the fact that the court apparently undertook to resolve a testimonial dispute. *See* Pet. App. A5 (noting testimonial conflict between Detective Ferrari and respondent Lawrence Perkins regarding accuracy of search warrant number that was provided).

e.g., *Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("We conclude that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property. . . . [M]ere lack of due care by a state official [does not] 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment.").[9]

Second, the acts of negligence alleged here are a legally insufficient basis for imposing *municipal* liability under § 1983 because they do not establish a municipal "policy or custom." *See*, *e.g.*, *Leatherman v. Tarrant County NICU*, 507 U.S. 163, 166 (1993) ("[A] municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury."); *see also Board of the County Comm'rs of Bryan County, Okla. v. Brown*, 117 S. Ct. 1382, 1387-88 (1997) (same). In addition, individual acts of negligence do not establish municipal liability under § 1983 because "a municipality may not be held liable under § 1983 solely because it employs a tortfeasor." *Bryan County*, 117 S. Ct. at 1388.[10]

[9] In addition to two conversations with a police detective, the court of appeals also described conversations with the issuing judge's chambers and with another judge. Pet. App. A5-A6. At a minimum, for the reasons stated, neither provides a basis for § 1983 liability.

[10] Analogously, absent "extreme circumstances," misinformation provided by government employees is not even a valid basis for estopping the government entity itself. *See*, *e.g.*, *OPM v. Richmond*, 496 U.S. 414, 420, 434 (1990) (declining to address whether estoppel may ever be asserted against the government, but noting that, at a minimum, "extreme circumstances" would be required to support a plea of estoppel); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)

Thus, even if the individual employees' post-notice statements amounted to negligence, such negligence would not provide a basis for imposing either individual or municipal liability under § 1983. More important, it is irrelevant to the question of the constitutional adequacy of the notice left at respondents' home by West Covina police officers, and it was improperly relied on by the court of appeals.

3. *The Court of Appeals Improperly Promulgated Instructions Regarding The Content Of The Notice*

The court of appeals erred in promulgating instructions regarding the content of notice and in micromanaging municipal codes of conduct. *See* Pet. App. A22. Although the court acknowledged that "detailed implementation" of the content of an adequate notice ought to be "left to the appropriate government agency," it ignored that principle and set forth extensive information that a notice "must" contain to be constitutionally sufficient. *Id.* In so doing, the court of appeals improperly intruded upon the autonomy of state and local executive and legislative functions.

Courts and commentators alike repeatedly have recognized that questions regarding the extent of notice generally are, and should be, questions of policy, not constitutional moment. *See, e.g., Dionne v. Bouley*, 757 F.2d 1344, 1354 (1st Cir. 1985) ("[T]he State is free to adopt such an elaborate [notice] requirement if it wants [but] we do not think the Constitu-

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(declining to estop the government from denying crop insurance benefits to a farmer who was misinformed by a government agent as to the scope of the farmer's insurance coverage).

tion compels it."); *McCahey v. L.P. Investors*, 774 F.2d 543, 551 (2d Cir. 1985) ("[W]e find no support for the assertion that New York *must* provide such procedures as a requirement of due process.") (emphasis in original); Diana G. Motz & Andrew H. Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligors*, 45 Md. L. Rev. 61, 70, 89 (1986) ("The failure of the notice required by various [state statutes] . . . to detail formally and laboriously the precise procedures by which a defense can be asserted, is constitutionally unimportant. . . . It is the task of the legislative branch of government to exercise its wisdom to create the form of notice most appropriate for a given situation.") (hereinafter Motz & Baida, *Due Process*).

The court of appeals' constitutional mandate that notices contain legal advice regarding post-deprivation remedies also deprives elected state and local officials—who are "closely responsible to the electorate," *Bogan v. Scott-Harris*, 118 S. Ct. 966, 972 (1998)—of policymaking authority. Indeed, it is telling that although virtually every State, the District of Columbia, and the Federal Government has adopted a procedure, by statute or court rule, governing search notices and return procedures, not a single statute or rule requires officers to provide notice of statutes or other legal remedies, or to provide legal advice regarding such remedies.[11] Moreover, while 36

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[11] *See* Fed. R. Crim. P. 41(d); Ala. Code § 15-5-11 & Ala. R. Crim. P. 3.11; Alaska Stat. § 12.35.025(b)-(c); Ariz. Rev. Stat. Ann. §§ 13-3919 to 13-3921; Ark. R. Crim. P. 13.3(b); Cal. Penal Code §§ 1535-1540; Colo. R. Crim. P. 41(d)(5)(v); Conn. Gen. Stat. Ann. § 54-33c(a); D.C. Code Ann. § 23-

States and the Federal Government require police officers to provide a copy of the search warrant as part of the notice, twelve States have declined to impose such a requirement.[12] This diversity of views regarding the appropriate content of search notices highlights the fact that the issue is one on which States can, and do, differ. More fundamentally, such diversity on this policy matter does not necessitate constitutionalizing the policy judgment of 36 States, nor

524(c)(1)-(3) & D.C. Super. Ct. R. Crim. P. 41(e)(4); Del. Super. Ct. R. Crim. P. 41(e); Fla. Stat. Ann. § 933.11; Ga. Code Ann. § 27-306; Haw. R. Penal P. 41(d); Idaho Crim. R. 41(d); 725 Ill. Comp. Stat. Ann. 5/108-6; Ind. Code Ann. §§ 35-33-5-1 to 35-33-5-8; Iowa Code Ann. § 808.8(1); Kan. Stat. Ann. § 22-2506; La. Code Crim. Proc. Ann. art. 166; Me. R. Crim. P. 41(d); Md. R. Crim. Causes 4-601(c); Mass. Gen. Laws Ann. ch. 276, §§ 3-7; Mich. Comp. Laws Ann. § 780.655; Minn. Stat. § 626.16; Mo. Ann. Stat. § 542.291(4); Mont. Code Ann. § 46-5-227; Neb. Rev. Stat. Ann. § 29-815; Nev. Rev. Stat. Ann. § 179.075(2); N.H. Rev. Stat. Ann. § 595-A:5; N.J. R. Crim. Prac. 3:5-5(a); N.M. R. Crim. P. - Dist. Ct. 5-211(C)-(D); N.Y. Crim. Proc. Law § 690.50(4); N.C. Gen. Stat. § 15A-252; N.D. R. Crim. P. 41(d); Ohio Rev. Code Ann. § 2933.241; Okla. Stat. Ann. tit. 22, §§ 1233-1234; Or. Rev. Stat. § 133.575(3); Pa. R. Crim. P. 2008(a)-(b); R.I. Super. Ct. R. Crim. P. 41(d); S.C. Code Ann. § 17-13-140; S.D. Codified Laws § 23A-35-10; Tenn. R. Crim. P. 41(d); Tex. Crim. P. Code Ann. § 18.06(b); Utah Code Ann. § 77-23-206; Vt. R. Crim. P. 41(d); Va. Code Ann. § 19.2-57; Wash. Super. Ct. Crim. R. 2.3(d); W. Va. Code § 62-1A-4; Wis. Stat. Ann. § 968.17(1); Wyo. R. Crim. P. 41(d).

[12] *See* Ariz. Rev. Stat. Ann. §§ 13-3919 to 13-3921; Cal. Penal Code §§ 1523-1542; Del. Super. Ct. R. Crim. P. 41; Ind. Code Ann. §§ 35-33-5-1 to 35-33-5-8; Iowa Code Ann. §§ 808.5 to 808.10; La. Code Crim. Proc. Ann. arts. 165-167; Mass. Gen. Laws Ann. ch. 276, §§ 3-7; Okla. Stat. Ann. tit. 22, §§ 1221-1241; S.C. Code Ann. § 17-13-140; Utah Code Ann. §§ 77-23-206 to 77-23-210; Va. Code Ann. § 19.2-57; Wis. Stat. Ann. §§ 968.17-968.20.

does it require declaring unconstitutional the permissible policy judgment of twelve other States.

Finally, nothing limits the court of appeals' ruling to search notices of the type at issue in this case. Under its reasoning, the constitutional sufficiency of numerous other types of notices likely would be called into question. In an effort to avoid the inevitable barrage of legal challenges to these notices, state and local governments would be forced to re-assess the adequacy of countless versions of notices, and to consider inclusion of information regarding statutory and other post-deprivation remedies.[13]

In sum, the court of appeals' constitutional rule is erroneous, and unnecessarily intrudes on the policy-making authority of state and local governments.

4. *The Court Of Appeals Incorrectly Applied* Mathews v. Eldridge *To A Due Process Challenge To The Content Of Notice*

The court of appeals applied an erroneous legal standard to assess the adequacy of the content of the notice. It mistakenly extended the analytical framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to a due process challenge to the content of a notice.

Mathews was not a notice case. Rather, it involved a question over the timing and extent of the opportunity to be heard. 424 U.S. at 332-33. The court of appeals cited no authority for its extension of *Mathews* to challenges based on the content of the notice—and

[13] For example, under the court of appeals' reasoning, States would arguably have a constitutional obligation to provide detailed legal advice to taxpayers concerning available post-deprivation remedies.

indeed, this Court has never applied *Mathews* in this setting.

To the contrary, *Memphis Light* confirms that *Mathews* does not provide the appropriate standard for assessing the adequacy of the content of notice. *Memphis Light* involved two separate issues, one relating to the adequacy of the notice and one relating to the adequacy of the opportunity to be heard. This Court applied the *Mullane* standard to assess the adequacy of the content of the notice. 436 U.S. at 13-14. In addressing the separate question of the timing and adequacy of the opportunity to be heard, the Court applied the *Mathews* framework. *Id.* at 15-17. Thus, the Court's separate treatment of the notice and process issues in *Memphis Light* confirms that *Mathews* does not apply to challenges based on the content of a notice. *See, e.g.*, Motz & Baida, *Due Process*, 45 Md. L. Rev. at 69 (observing that *Mathews* applies "only to determine when and what sort of a hearing must be provided," and that no post-*Mathews* decision "articulate[s] any application of the *Mathews* factors to determine the type of notice that is constitutionally adequate").

The appropriate due process inquiry is whether there is adequate notice and an opportunity to be heard. The *Mathews* framework applies to the adequacy of the latter, not to the former. The content of the notice left by the West Covina police department at respondent Lawrence Perkins' residence satisfied these basic requirements. No further notice regarding available post-deprivation remedies was constitutionally required.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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